86 1916

Supreme Court, U.S.
FILED
MAY 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN FLAHIVE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROGER BENNET ADLER, P.C.
225 Broadway
New York, New York 10007
(212) 406-0181

Counsel for Petitioner

QUESTIONS PRESENTED

1. Did the Court below err in according this Court's holding in *United States v. Leon*, 468 U.S. 897 (1984) applicable to a warrant executed prior to the decision in Leon?

2. Was the search warrant issued predicated upon stale information?

3. Was the marital privilege violated by the admission of testimony as evidence in chief by Petitioner's former wife?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner John Flahive and co-defendants Sam Salstein and Robert Mari, and the Respondent United States of America. Only Petitioner Flahive is applying to this Court for a Writ of Certiorari.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Decisions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statutory Provisions Involved	3
Statement of Cases	6
Reasons for Granting the Writ	8
Conclusion	15

APPENDIX

Opinion of the Court of Appeals	A-1
District Court's Decision Denying Motion to Suppress Evidence	A-4

TABLE OF AUTHORITIES

	Page
Desist v. United States, 394 U.S. 244 S.Ct. 1030 (1969)	8
Francis v. Franklin, 471 U.S. 307	9
Hill v. California, 401 U.S. 797 S.Ct. 1106 (1971)	8
Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1984)	11
In Re Grand Jury Subpoena United States v. Hans Koecher, 755 F.2d 1022 (2nd Cir. 1985) vac. as moot, ____ U.S. ____, 106 S.Ct. 1253 (1986)	13
Sgro v. United States, 287 U.S. 206 (1932)	10
United States v. Ammar, 714 F.2d 238, 259 (3rd Cir.), *cert.* den. 104 S.Ct. 344	14
United States v. Buck, 813 F.2d 588 (2nd Cir. 1987)	11
United States v. Campbell, 732 F.2d 1017, 1020 (1st Cir. 1984)	11
United States v. Cassity, 807 F.2d, 509, 511 (6th Cir. 1986)	9
United States v. Estes, 793 F.2d 465 (2nd Cir. 1986)	7,12,13
United States v. Fama, 758 F.2d 834, 836-37 (2nd Cir. 1985)	8,11

	Page
United States v. Leon, 468 U.S. 897 (1984)	6,7,8, 9,11
United States v. Lustig, 555 F.2d 737 (9th Cir. 1977) *cert.* den. 434 U.S. 926 (1977)	12
United States v. Parker, 722 F.2d 179, 182 (5th Cir. 1983)	11
United States v. Sager, 743 F.2d 1261 (8th Cir. 1984) *cert.* den 469 U.S. 1217 (1985)	9
United States v. Steeves, 525 F.2d 33, 38 (1975) ..	10
United States v. Tate, 795 F.2d 1487 (9th Cir. 1986)	9
United States v. Thomas, 757 2d 1359 (2nd Cir. 1985)	9,10
Yates v. Aiken, (Docket No. 86-6060)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN FLAHIVE,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, JOHN FLAHIVE, respectfully prays that a Writ of Certiorari be issued to review the order of the Court of Appeals for the Second Circuit entered in this case on or about February 5, 1987, which affirmed a judgment of the United States District Court, Eastern District of New York (Maletz, J.) entered on July 15, 1986.

DECISIONS BELOW

The opinion of the Court of Appeals is unreported and appears as Appendix A to this Petition. The Court of Appeals in its February 5th order affirmed a judgment of the United States

District Court, Eastern District of New York (Maletz, J.) convicting Petitioner of racketeering (18 USC 1962) and possession of stolen property (18 USC 659). Judge Thomas Platt's decision denying Petitioner's motion to controvert the search warrant and suppress physical evidence reproduced in Appendix B to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254. This Petition for a Writ of Certiorari is filed within sixty (60) days of the Court of Appeals' order entered April 2, 1987, denying Petitioner's timely application for re-hearing and re-hearing en banc.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTORY PROVISIONS INVOLVED

Rule 41. provides: Search and Seizure.

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) Property or Persons Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use of which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) Issuance and Contents.

(1) Warrant upon Affidavit. A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probably cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath

the affiant and any witness he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorities its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(d) Execution and Return with Inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory or any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property

was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

STATEMENT OF FACTS

The Petitioner, JOHN FLAHIVE, was convicted* of violating *inter alia* the federal anti-racketeering statute (RICO) [18 USC 1962 (c) & (d)] in connection with his alleged participation in a scheme to possess and distribute stolen property, and with co-defendant Sam Salstein's criminally usurious money lending business. The Government's proof against Petitioner Flahive consisted mainly of evidence seized from Flahive's tavern, "John and Jessie's Other Place" on August 9, 1983, pursuant to a search warrant issued by a Federal Magistrate on August 1, 1983, and of testimony of his former wife, Frances Flahive, concerning the presence of merchandise in their marital residence. Furthermore, it was shown that a search warrant was issued by an Eastern District of New York Magistrate in reliance upon the supporting hearsay affidavit of FBI Special Agent Henley, which in turn was predicated upon information supplied by the then confidential informant and criminal Richard Donnelly.

Prior to trial, Judge Thomas Platt ruled that the search warrant was issued upon a proper showing of probable cause, and that the information in support was not stale. The motion to suppress the evidence was denied.

The memorandum decision relied on the court's holding that the United States Supreme Court's decision in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984), decided after the warrant was executed, applied retroactively.

Subsequently, at trial, the trial judge, Hon. Herbert Maletz permitted Petitioner's former wife, Frances Flahive, to testify on the Government's direct case concerning Petitioner's statements and actions since her knowledge of and assistance in the alleged stolen merchandise operation qualified her testimony as an exception to the protection of the marital privilege. Frances Flahive testified that while she was married to and still residing with Petitioner, she did not know the various

---

* Petitioner's co-defendants Robert Mari and Sam Salstein were likewise convicted.

merchandise stored in the basement of their home was stolen merchandise. At trial, she identified several articles of clothing as the items either taken from her home or relinquished by her to the Government. Mrs. Flahive identified documents, allegedly containing Petitioner Flahive's handwriting, as the same documents she removed from a locked closet in the marital bedroom unbeknownst to Petitioner Flahive.

The jury returned verdicts convicting Petitioner under two conspiracy counts and one RICO substantive count (counts 1, 2, & 3) and the subsequent counts for stolen property pursuant to 18 U.S.C. 659 (counts 5, 7 and 10 through 13). Judge Maletz sentenced Appellant to concurrent six year terms and $10,000 fines on counts 1 through 3. With respect to the "659" stolen property counts, the Court sentenced him to 6 year terms and a fine of $3,000 on each count for a total of $18,000 in fines. The Court directed the 6 year term to run concurrently with the 6 year term imposed under the RICO counts, but directed that the $18,000 in fines was imposed consecutively to the $10,000 fine previously imposed. The District Court stayed imposition of sentence and continued Flahive on bail pending appeal.

A timely notice of appeal was filed. Following the submission of briefs and oral argument, the Court of Appeals decided, on February 5, 1987, to affirm the judgment of the District Court based on *inter alia* an understanding that this Court's decision in *United States v. Leon*, 468 U.S. 897 (1984), applied retroactively, and that the testimony of Petitioner's former wife did not violate the marital privilege since Mrs. Flahive allegedly participated in the criminal activity and therefore the testimony came within the "joint crime" exception recognized by the Court of Appeals for the Second Circuit in *United States v. Estes*, 793 F.2d 465 (2nd Cir. 1986). Subsequently, on April 2, 1987, the Court of Appeals denied Petitioner's application for re-hearing *en banc*.

REASON FOR GRANTING THE WRIT

I

THE HOLDING IN UNITED STATES V. LEON SHOULD BE APPLICABLE TO WARRANTS EXECUTED AFTER ITS DECISION

This Court's holding in *United States v. Leon*, 468 U.S. 897 (1984), represented a dramatic departure in the role which District Court Judges were to apply the protections of the 4th Amendment where evidence was seized pursuant to a search warrant. In this case federal agents relying upon the stale hearsay allegations of criminal informants applied for and were granted authority of seize evidence from Petitioner's tavern in Queens, New York. This seizure was authorized prior to the holding in *United States v. Leon, supra.*

The question whether *Leon* dealing with a dramatic change in the law should be applied retroactively to warrants issued prior to the date *Leon* was decided has not been determined by this Court.

In the area of retroactivity, this Court when dealing with the constitutional propriety of the acquisition of evidence has generally confined its Fourth Amendment cases to prospective application (see e.g. *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030 [1969]; *Hill v. California*, 401 U.S. 797, 91 S.Ct. 1106 [1971]) particularly where, as here, the Court's pronouncement represents a clear and distinctive break with past decisions. The determination to depart from the two-step "Aguilar-Spinelli" test and adopt a "good faith" reliance test is assuredly a marked departure from prior Fourth Amendment practice and precedent. As such, unless or until *United States v. Leon, supra*, is held retroactive (c.f. *United States v. Fama*, 758 F.2d 834, 836-37 [2nd Cir. 1985]), we submit that it was error to deprive these defendants of the greater privacy protections and judicial scrutiny afforded prior to the *Leon* decision.

In its decision to affirm Appellant's conviction, the panel we submit, misplaced reliance on a prior decision to apply *Leon* retroactively in a separate case with distinctly different circumstances. See e.g., *United States v. Thomas*, 757 2d 1359 (2nd Cir. 1985). At the pre-trial hearing below Appellant strenuously objected to the district court's application of the good-faith exception to the exclusionary rule to a warrant issued prior to the Supreme Court decision. In *United States v. Thomas*, the district court applied the good-faith exception recognized by *Leon* absent objecton and without announcing a steadfast rule that *Leon* necessarily applies retroactively in all cases. Accordingly, this Court misapplied the holding in *Thomas* to the case at bar. For these reasons, determination of the retroactivity question should be resolved by the granting of *Certiorari* to review this case.* Indeed, this Court in *Yates v. Aiken* (Docket No. 86-6060) has granted a writ of certiorari to review the issue of retroactivity of the Court's earlier decision in *Francis v. Franklin*, 471 U.S. 307.

---

* We concede that other Circuit Courts of Appeal which have dealt with the retroactivity question have held *Leon* retroactive. See *United States v. Tate*, 795 F.2d 1487 [9th Cir. 1986]; *United States v. Cassity*, 807 F.2d 509, 511 [6th Cir. 1986]; *United States v. Sager*, 743 F.2d 1261 [8th Cir. 1984], *cert. den.* 469 U.S. 1217 (1985).

II

THE EVIDENCE SEIZED AT JOHN AND JESSIE'S TAVERN SHOULD HAVE BEEN SUPPRESSED

The search warrant authorizing the seizure of books and records from Petitioner's tavern called "John and Jessie's Other Place", issued on August 1, 1983, and was executed on August 9, 1983, was, we respectfully submit, erroneously issued based upon clearly stale information which served as the foundation supporting the finding of probable cause. FBI Special Agent Henley's supporting affidavit was predicated upon information supplied by the then confidential informant Richard Donnelly. It was alleged that in 1979, some four years prior to the issuance of the warrant, Donnelly delivered extortionate loan payments to the aforementioned tavern to be given to defendant Salstein. It is the passage of time and the possible change in events which turned what may have been relevant, reliable information into stale, out-dated information. *United States v. Thomas*, 757 F.2d 1359, 1367-68 (2nd Cir. 1985); *Sgro v. United States*, 287 U.S. 206 (1932).

It is fundamental that for the issurance of a warrant the constitutionally required existence of probable cause must be recent and timely. Indeed, probable cause must exist at the time of the issuance and execution of a search warrant. It is insufficient if the circumstances which previously justified a search do not exist when the warrant is issued. See 3 Wright, Federal Practice and Procedure Sec. 662, p. 23; *United States v. Steeves*, 525 F.2d 33, 38 (1975). Since the issuance of the search warrant authorizing the search at Flahive's bar was based on information concerning an occurrence four years earlier, the warrant was clearly founded on stale information, and properly should have been controverted, and the telephone book seized at the tavern should have been suppressed.

Additionally, the affiant for the warrant Agent Hanley failed to establish the reliability of the underlying information. No facts existed which indicated the presence of books and business records

at Petitioner's tavern. Richard Donnelly's reputation for veracity was substantially rebutted at trial partially with his own admissions for lying and partially through questions on cross-examination. The failure to establish the informant's reliability and truthfulness violates established Fourth Amendment Principles, especially when the information supporting the affidavit is unreliable due to staleness. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 (1984); *United States v. Campbell*, 732 F.2d 1017, 1020 (1st Cir. 1984); *United States v. Parker*, 722 F.2d 179, 182 (5th Cir. 1983).

Moreover, where the warrant is patently defective, the good-faith exception is inapplicable. Suppression of evidence seized pursuant to a warrant is permitted when the seizing officers could not have harbored an objectively reasonable belief in the existence of probably cause. *United States v. Fama*, 758 F.2d 834, 837 (2nd Cir. 1985). We respectfully submit, the search warrant issued in the present case was based on stale information and, particularly since there was no evidence that the records or documents would be present at the tavern, the officers who executed the warrant could not have possibly harbored an objectively reasonable belief in the existence of probably cause. Accordingly, even if *United States v. Leon, supra*, is applicable the evidence still should not have been held admissable evidence in chief at trial (c.f. *United States v. Buck*, 813 F.2d 588 [2nd Cir. 1987], in which the Court of Appeals for the Second Circuit has indicated that *Leon* can excuse a failure of constitutional dimension in describing the items authorized to be seized). In the light of such interpretations many feel that the Fourth Amendment's exclusionary rule is a "dead issue" in warrant cases within the jurisdiction of the Court of Appeals for the Second Circuit. Review of these expansionist applications of *Leon* is clearly warranted.

III

PERMITTING APPELLANT'S FORMER WIFE TO TESTIFY OVER OBJECTION BREACHED THE CONFIDENTIALITY OF THE MARITAL PRIVILEGE AND THUS CONSTITUTES REVERSIBLE ERROR

Petitioner's estranged wife Mrs. Frances Flahive testified, over strenuous objection, during the Government's case-in-chief, concerning statements and activities of Petitioner's which occurred during the course of the marriage, yet not during the course of the alleged criminal conspiracy to possess stolen property. The district court denied Petitioner's objections that permitting the disclosure of confidential communications violated Flahive's protection of the marital privilege. The Court of Appeals finding that Mrs. Flahive's testimony was excepted from the marital privilege by virture of Mrs. Flahive's alleged participation in the conspiracy, affirmed the judgment below primarily relying on its rationale in *United States v. Estes*, 793 F.2d 465 (2nd Cir. 1986).

In the present case, Mrs. Flahive's "participation" in the plan to receive stolen property occurred after Petitioner Flahive possessed the property. The witness encountered the property after its arrival in the basement of her family home, where she later assisted in inventorying and distributing the property. At no point did Petitioner tell Mrs. Flahive that the property was stolen, or that the money they were to receive from people arriving at their home to pick up the property was in payment for stolen property. She admittedly drew her own conclusions about the presence of the variety of property in their basement, and testified that her conclusions were based on intuition from John's behavior.

---

* The existence of the privilege for husband-wife confidential communications existed at common law and in light of the history concerning Rule 505 continues in full force and effect (*United States v. Lustig*, 555 F.2d 737 [9th Cir. 1977], *cert. den.* 434 U.S. 926 [1977]).

Moreover, John's actions were clearly engaged in because of his confidence and reliance on the confidentiality of his relationship with his wife within the confines of the marital confidences within the marital abode.

Mrs. Flahive's participation was at best that of an accessory after the fact. In *United States v. Estes*, in reversing Estes' conviction of testifying falsely before a grand jury about his involvement in the theft of an armored car, this Court reasoned that permitting Estes' estranged wife, Lydia, to testify concerning her husband's statement that the money was stolen was reversible error in that it violated the marital privilege. Although Lydia assisted her husband in hiding the money after he brought it home, her participation was guilt properly characterized as that of an accessory after the fact. It was held prejudicial error to permit Lydia to testify to Mr. Estes' act of bringing home a bag of money, and of his statement that he had stolen it from the armored truck, since these events occurred after completion of the robbery.

Similarly, we respectfully submit, permitting Mrs. Flahive to testify concerning the words and "verbal acts" of her former husband was prejudicial error since she was also no more that an accessory after the fact. When the merchandise arrived at the Flahive home any crime of conspiracy to possess and possession of stolen property was already completed. Any assistance Petitioner may have received by his wife at that point was not done in the course of the crime. At best, the assistance aided Flahive in concealing any alleged criminal activity. We submit, based on the facts, the recent holding in the present case cannot honestly be reconciled with the holding in *United States v. Estes, supra*.

Flahive's reliance on the confidentiality of his communications with his wife was reasonable, and since the confidential communications were made after the completion of any charged crime, the marital privilege properly should have prevented Mrs. Flahive from testifying. See *In Re Grand Jury Subpoena United States v. Hans Koecher*, 755 F.2d 1022 (2nd Cir. 1985) vac. as moot, ____ U.S. ____, 106 S.Ct. 1253 (1986). To the extent that the Court of Appeals continues to apply an overly expansive view

of the joint crime exception to the spousal privilege, and extends joint participation to encompass unwitting low level facilitators, the privilege has little evidentiary protection in the Federal Courts of New York (c.f. *United States v. Ammar*, 714 F.2d 238, 259 [3rd Cir.], *cert. denied.* 104 S.Ct. 344.

We submit that a re-examination of both the confidential marital communications privilege and the application of the joint crime exception to such an important privilege is warranted.

CONCLUSION

FOR THE REASONS STATED, WE RESPECTFULLY PRAY THAT A WRIT OF CERTIORARI TO REVIEW THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT BE GRANTED.

Dated: New York, New York
May, 1987

ROGER BENNET ADLER, P.C.
225 Broadway
New York, New York 10007
(212) 406-0181

Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held in the United States Courthouse in the City of New York on the 5th day of February, one thousand nine hundred and eighty-seven.

PRESENT:

HON. LAWRENCE W. PIERCE,
HON. FRANK X. ALTIMARI,
Circuit Judges,

HON. CHARLES E. STEWART, JR.,
*District Judge.**

UNITED STATES OF AMERICA,

Appellee,

-v-

JOHN FLAHIVE, ROBERT MARI, and SAM SALSTEIN,

Defendants-Appellants.

ORDER

86-1374, 86-1408, 86-1409

This is an appeal from judgments entered in the United States District Court for the Eastern District of New York (Herbert N. Maletz, *Judge*, sitting by designation) convicting the appellants of RICO conspiracy and of a substantive RICO count relating to a scheme to possess and sell stolen property,

---

* Hon. Charles E. Stewart, Jr. of the U.S. District Court for the Southern District of New York, sitting by designation.

18 U.S.C. §§ 1962(c)-(d) & 2, and various counts of possessing stolen property in violation of 18 U.S.C. §§ 659 & 2. Appellants Salstein and Flahive also were convicted of a substantive RICO count related to loansharking activities. Numerous claims of error are asserted.

1. Appellant Flahive suggests that allowing his wife to testify over his objection as to his activities vis-a-vis stolen marchandise violated the privilege relating to marital communications. This argument fails. First, this circuit has recognized an exception to this privilege for statements made to a spouse who participates jointly in the criminal activity. *See United States v. Estes*, 793 F.2d 465, 468 (2d Cir. 1986). Herein, Flahive's spouse participated in the criminal activity by, *inter alia*, (1) helping him inventory the merchandise with knowledge that the goods were stolen, and (2) receiving payment on Flahive's behalf for the goods. Moreover, nearly all of her testimony related to the acts rather than the communications of John Flahive and therefore falls outside the scope of the privilege. *Id.* at 467. We find no error in allowing the spouse to testify.

2. Flahive and Salstein challenge the admission of certain evidence, claiming that probable cause to support the warrants that were issued to search certain premises was lacking and that the district court erred in not holding a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). This argument fails because there was no substantial preliminary showing of false statements by an affiant and, alternatively, the district judge made a finding that the officer's execution of the warrants was made in good faith. This was not error. *See United States v. Leon*, 468 U.S. 897 (1984). The *Leon* case is retroactive in its application, as is evidenced by cases which have applied *Leon* to pre-*Leon* searches. *See, e.g., United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985); *United States v. Tate*, 795 F.2d 1487 (9th Cir. 1986).

3. Mari suggests that the district court erred in denying him a severance pursuant to Fed. R. Crim. P. 14. Severance is predicated upon the defendant satisfying the district court that

the defendant will be prejudiced by joinder. This determination is a matter within the discretion of the district court. *United States v. Potamitis*, 739 F.2d 784, 790 (2d Cir.), *cert. denied*, 469 U.S. 918 & 934 (1984); *see* Rule 14 advisory committee note. Mari points out that he was not charged with loansharking, as were Flahive and Salstein, and suggests that the testimony related to loansharking had prejudicial spill-over effects. We cannot accept this argument since we do not believe that the prejudice, if any, amounted to a "miscarriage of justice," *id.*, and since appellant points to no evidence indicating that the jury disregarded or was unable to follow the curative instruction given by the district court, *see United States v. Teitler*, 802 F.2d 606, 617 (2d Cir. 1986).

We have considered appellants' other claims of error, and conclude that they do not require discussion. To the extent that each appellant has joined in the claims of the others, those claims lack merit. We therefore affirm the judgments of conviction.

s/Lawrence W. Pierce

HON. LAWRENCE W. PIERCE,

s/Frank X. Altimari

HON. FRANK X. ALTIMARI,
Circuit Judges,

s/Charles E. Stewart, Jr.

HON. CHARLES E. STEWART, JR.,
District Judge.

N. B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

SAM SALSTEIN, JOHN FLAHIVE, ROBERT MARI and JAMES BARTON,

Defendants.

---

84 CR 568

MEMORANDUM AND ORDER

PLATT, D. J.

The thirteen-count indictment in this case charges three of the four defendants -- Messrs. Salstein, Flahive and Mari -- with violations of Title 18 U.S.C. §§1962(c) and 1962(d), the so-called RICO statute. Defendant Barton is charged with violating Title 18 U.S.C. §659 and 2 (theft of goods travelling in interstate commerce and aiding and abetting the same).

It is the Government's contention that the criminal enterprise charged in the indictment had two branches: one aspect of the enterprise was concerned with identifying, locating, arranging for the theft of, and receiving goods stolen while travelling in interstate commerce. It is alleged that Mr. Barton was a principal supplier of stolen goods to the alleged criminal enterprise.

Furthermore, the Government contends, the proceeds of the business of wholesaling and retailing stolen goods were funnelled into the other branch of the enterprise which was engaged in extortionate credit transactions. The two areas of unlawful activity were symbiotic in that the cash raised by the sale of stolen goods could be let at extortionate rates and the income realized from the collection of extortionate interest was used to finance the purchase of goods stolen from interstate commerce.

I.

A. Defendants Salstein and Flahive have demanded a bill of particulars pursuant to Rule 7(f), F.R.Cr.P. This question is within the sound discretion of the Court, and the Court finds that the indictment herein is extensive and particular. Moreover, read together with the Government's submission, ordered by this Court, in the nature of marked pleadings, the indictment provides to the defendants more particulars than is usual in criminal cases of this nature.

B. Defendant Salstein, joined by defendant Flahive, has moved for an order directing the Government to provide defendants with a list of Government witnesses. This relief is also within the discretion of the Court, which declines to exercise the same on behalf of the defendants.

First, the defendants have made no "specific showing of a particularized need for a witness list . . . . " *United States v. Cafaro*, 480 F. Supp. 511, 520 (S.D.N.Y. 1979).

Second, even defendant Salstein admits through his attorney that those witnesses not in the Witness Protection Program might be endangered (Kirby Affidavit, Jan. 1, 1985, at 1). The Government further represents to this Court at pages two and three of Mr. Kirby's affidavit of January 14, 1985 that already potential Government witnesses in this case have been threatened and/or injured.

The Government is also opposed to releasing the names of those witnesses who are in the Witness Protection Program, for by doing so the Government would perhaps identify those possible witnesses who are *not* protected.

C. Defendants Mari and Barton have moved for severances pursuant to Rule 8(b), F.R.Cr.P.

These motions are denied. Quite simply, the Government has alleged that all of the named defendants "participated in the

same act or transaction or in the same series of acts or transactions constituting an office or offenses." (Rule 8(b), F.R.Cr.P., in pertinent part.)

(1) Three of the four defendants are charged under Title 18 U.S.C. §1962 as being associated together in a criminal enterprise.

(2) While Mr. Barton is alleged to have participated only in the stolen goods branch of the alleged criminal enterprise, it is the Government's theory that the theft of goods in interstate commerce provided the wherewithal to fund the loansharking operation, and the profits, in turn, from the loansharking were used to purchase the goods stolen in interstate commerce.

Certainly the Government has met the "logical relationship" test of *United States v. Ford*, 632 F.2d 1354, 1372 (9th Cir. 1980), and represents as well that at trial it will meet the "overlapping proof" test of *United States v. Hamilton*, 726 F.2d 317, 321 (7th Cir. 1984).

D. Defendants Mari, Flahive and Barton move pursuant to Rule 14, F.R.Cr.P., to sever the charges against them.

These motions are denied. The defendants make the usual assertions of the danger of prejudicial "spillover," but none has shown the "substantial prejudice" required by *United States v. Werner*, 620 F.2d 922, 928 (2d Cir. 1980). Considerations of judicial economy are weighty here (particularly, as Judge Friendly points out in *Werner*, in light of the Speedy Trial Act) and the standard of review for refusal to grant a severance under Rule 14 is abuse of discretion.

The Court has a standard curative instruction for this common situation, and counsel may submit prior to trial for our consideration such proposed instructions as they may deem appropriate.

E. Defendant Flahive has moved for a pre-trial *Geaney* hearing on the admissibility of evidence as to alleged co-conspirators in his trial.

This motion is denied. The holding in *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), does not require the Government to provide discovery via a "dry run" of its case. Defendant Flahive cites only *Geaney* itself for the proposition that a pre-trial hearing and determination should be granted. *Geaney*, in fact, does not even suggest such a procedure. The defendant's remedy in this situation is the declaration of a mistrial if, during the trial, the Court finds that there is not sufficient non-hearsay evidence to support the finding of the existence of a conspiracy.

F. Defendant Barton has moved to dismiss the indictment as to him on the grounds of prosecutorial delay.

In support of this nearly frivolous motion, Mr. Barton makes a boiler-plate allegation of prejudice (unidentified exculpatory witnesses who have become unavailable for unexplained reasons) and makes the hoary argument that the Government must indict the instant legally sufficient evidence against an individual defendant has been developed. The Supreme Court has most recently rejected this argument in *United States v. Gouveia*, _____ U.S. _____, 104 S. Ct. 2300 (1984), citing its more detailed discussion of this issue in *United States v. Lovasco*, 431 U.S. 783, 97 S. Ct. 2044 (1977). Accordingly, defendant Barton's motion must be denied in all respects.

II.

Defendant Salstein and defendant Flahive have moved to controvert search warrants and to suppress the evidence seized thereunder.

A. Defendant Salstein has moved pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978), for an evidentiary hearing on the grounds that the affidavits in support of the application for the search warrants for the Salstein residence, Mr. Salstein's safe deposit boxes and the business premises of F. Salstein, Inc., contained statements of confidential informants that Special Agent Michael Hanley knew or should have known

to be false and that if these materially false statements are removed from consideration, sufficient probable cause would not exist to sustain the search warrants.

B. Both Salstein and Flahive move to controvert search warrants on probable cause grounds asserting that the information supplied by the four confidential informants is stale. Admittedly, the activity giving rise to the information supplied by the informants took place between 1979 and July 1983. The search warrants attacked here were issued on August 1, 1983 and August 9, 1983.

A.

Defendant Salstein's demand for a *Franks* hearing is easily disposed of. In *Franks* the Court spells out specifically what is required of the defendant to invoke a *Franks* hearing:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidaivt that is claimed to be false; and they should be accompanied by a statement of supporting reasons. *Affidavits or sworn or otherwise reliable statements of witnesses should be furnsihed, or their absence satisfactorily explained.*

438 U.S. 154, 171, 98 S. Ct. 2678, 2684 (1978) (emphasis supplied).

The only proffer of defendant Salstein in support of his demand for a hearing in his attorney's affidavit which contains only conclusory statements and simple denials of the allegations

such as one might expect to find in the Answer to a civil complaint. Since defendant Salstein has utterly failed to fulfill the threshold requirement for a *Franks* hearing, we need not address Mr. Salstein's claims that Agent Hanley knowingly used false information or employed information with reckless disregard for the truth.

B.

Defendants Salstein and Flahive also challenge the various search warrants on the ground that the affidavits of Agent Hanley are based upon stale information.

The elaborate criminal enterprise alleged by the Government is by its very nature a continuing illegal business. The prosecution asserts that the defendants named in the indictment associated together to steal goods moving in interstate comerce and to receive the same. The proceeds of this end of the business were then used in the extortionate credit or loansharking aspect of the business.

It is well settled that the lifeblood of loansharking is the usurious interest which is periodically collected from the victims. Loansharks are not concerned about recovering the principal of the loan – perpetual "vig" or interest is the goal of makers of extortionate loans. Perforce, loansharking is an ongoing and continuous crime – not an isolated or discrete crime.

Furthermore, like their legitimate counterparts, loansharks necessarily keep books and records of their transctions and usually have ready access to large sums of cash; therefore, there is a likelihood that the fruits and instrumentalities of an ongoing crime of this nature would be close to hand.

There is ample authority for the proposition that arguments of staleness of information are frail ones in the context of an ongoing criminal enterprise: "The issue as to whether or not information in the affidavit is stale must depend upon the nature of the activity in question and usually will require review on a case-by-case basis." *United States v. Harris*, 482 F.2d 1115, 1119 (3d Cir. 1973).

In *United States v. Johnson*, 461 F.2d 285 (10th Cir. 1972), the Court, discussing the issue in the setting of a bootlegging case, said that:

> Together with the element of time we must consider the nature of the unlawful activity. Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant.

United States v. Johnson, at 287.

Four search warrants are challenged here. Three of them were among four search warrants which were issued August 1, 1983, to search the premises of (1) F. Salstein, Inc., (2) Jo-Mar Painting Co. (this warrant has not been attacked), (3) the residence of defendant Samuel Salstein, and (4) John and Jessie's Other Place, a bar of which defendant John Flahive is part owner. A fifth search warrant was issued August 9, 1983, for the three safe deposit boxes at the National Bank of North America maintained by Samuel Salstein. The application for the fifth warrant incorporated all of the information contained in the affidavit for the first four warrants together with new evidence uncovered in the search of Mr. Salstein's residence (loansharking records and three safe deposit box keys).

Much of the intelligence in Agent Handley's affidavits was gathered from four confidential informants variously denominated as CS1 through CS4 and from an undercover New York City policeman.

CS1 was a participant in some of the alleged criminal activities of the alleged Salstein enterprise. CS1's information relates to the period from the Fall of 1979 to the latter half of 1982.

CS2 was a participant in alleged thefts from interstate commerce as well as a client of the loansharking end of the business. CS2's information relates to the period from October 1979 to early 1980. There is independent evidence to corroborate most of CS1's and CS2's information.

CS3 supplied information as to three incidents involving defendants Salstein and Mari in the Spring of 1980.

CS4 claims to have known Mr. Salstein personally for "a number of years." His information, as recited in the Hanley affidavit dated August 1, 1983, is that as of July 1983, Mr. Salstein was actively engaged in dealing in stolen property.

Defendants Salstein and Flahive argue that all of the information of the confidential informants as to the alleged theft of goods moving in interstate commerce, the receiving of same, and the extortionate credit transactions is too outdated – even if true – to support a finding of probable cause.

For the reasons and under the authority stated above and as aptly and gracefully put by the Court of Special appeals of the State of Maryland in *Andresen v. State*, the defednants' motions as to the search warrants must be, and hereby are, denied:

> The ultimate criterion in determining the degree of evaporation of probable cause, however, is not case law but reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc. The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the

> cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed. The massive records and files of the appellant-attorney and his protean corporate extensions in this case are more akin to the latter than to the former. In terms of nonstaleness, the probable cause here was still as the first dew of the morn.

Andresen v. State, 331 A.2d 78, 106, *aff'd sub nom. Andresen v. Maryland*, 427 U.S. 463, 96 S. Ct. 2737 (1976).

* * * * *

In any event, the Court finds that under *Gates v. Illinois*, _____ U.S. _____, 103 S. Ct. 2317 (1983), the Magistrate, "given all the circumstances set forth in the affidavit before him, had "a substantial basis" for determining that there was a "fair probability that contraband or evidence of a crime [would] be found in a particular place," *id.* at 2332; and that, pursuant to the holding in *United States v. Leon*, _____ U.S. _____, 104 S. Ct. 3405 (1984) – even if this Court found a lack of probable cause – "a reasonably well-trained officer" could have executed the warrant in good faith, relying on the facial validity of the warrants and the affidavits.

In short, both defendants' motions are without merit and are denied in all respects.

SO ORDERED.

s/

U.S.D.J.

Dated: Brooklyn, New York
May 20, 1985.